In The

Supreme Court of the United States

October Term, 1972

No. 72-1129

SUSAN COHEN,

Petitioner,

v.

CHESTERFIELD COUNTY SCHOOL BOARD AND DR. ROBERT F. KELLY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FREDERICK T. GRAY
ROBERT E. EICHER
SAMUEL W. HIXON, III
Williams, Mullen & Christian
510 United Virginia Bank Building
Richmond, Virginia 23219

OLIVER D. RUDY
MORRIS E. MASON
P. O. Box 25
Chesterfield, Virginia 23832

Counsel for Respondents

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitution, Statutes and Rules

In The

Supreme Court of the United States

October Term, 1972

No. 72-1129

SUSAN COHEN,

Petitioner,

v.

CHESTERFIELD COUNTY SCHOOL BOARD AND DR. ROBERT F. KELLY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, is unreported. (Pet. App. 14a). The opinion of the United States Court of Appeals for the Fourth Circuit initially affirming the judgment of the United States District Court for the Eastern District of Virginia, Richmond Division, is unreported. (Pet. App. 1a) The decision of the United States District Court for the Eastern District of Virginia, Alexandria Division, is reported at 326 F. Supp. 1159 (E.D. Va. 1971).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 14, 1972. On September 20, 1972, respondents filed their Petition for Rehearing and Suggestion for rehearing *en banc*, which Petition and Suggestion was granted on January 2, 1973. The judgment of the United States Court of Appeals for the Fourth Circuit, *en banc*, was entered on January 15, 1973. The petition for a writ of certiorari was filed on February 15, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, Sec. 1

". . . , [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED FOR REVIEW

Is the Chesterfield County School Board's regulation requiring pregnant teachers to make themselves available for a leave of absence after the fifth month of pregnancy so devoid of any reasonable basis that it violates the equal protection clause of the Fourteenth Amendment to the United States Constitution?

Did the United States Court of Appeals for the Fourth Circuit violate petitioner's rights under the due process clause of the Fourteenth Amendment by accepting a Suggestion for Rehearing, *en banc*, and granting a Petition for Rehearing without requesting petitioner to file briefs and present arguments in opposition?

STATEMENT OF THE CASE

This is a case brought under the Civil Rights Act of 1871 (42 U.S.C. § 1983). The plaintiff, formerly employed as a public school teacher by the School Board of Chesterfield County, Virginia, complains that a school board regulation requiring her to be available for a leave of absence at the end of her fifth month of pregnancy discriminates against her as a woman, and thereby deprives her of equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Plaintiff was employed as a school teacher by the defendant School Board for the 1970-71 school year under an employment contract as required by law. That contract provides, in part, that "The said party of the second part [the plaintiff] shall comply with all school laws, State Board of Education regulations, and all rules and regulations made by the party of the first part [the defendant School Board] in accordance with the law and State Board of Education regulations. . . ."

The plaintiff challenges the constitutionality of the defendant School Board's maternity leave regulation, which provides, in pertinent part, as follows:

> "a. Notice in writing must be given to the School Board at least six (6) months prior to the date of expected birth.
>
> "b. Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved."

The rule further provides that upon termination of employment a pregnant teacher goes on maternity leave and continues to enjoy personal benefits during such leave and has a guarantee of re-employment.

On or about November 2, 1970, the plaintiff notified the defendant School Board in writing that she was pregnant. She stated that her estimated date of delivery was April 28, 1971, and, with the consent of her obstetrician, requested that she be given maternity leave effective April 1, 1971.

Her request was denied, and maternity leave was granted effective December 18, 1970, the day before Christmas vacation pursuant to the maternity leave regulation.

On November 25, 1970, the plaintiff personally appeared before the defendant School Board and requested an extension of her maternity leave date from December 18, 1970 to January 22, 1971. This was denied. The basis for denial was that the defendant School Board had a replacement teacher available for hire.

Various reasons were assigned for the existence of the maternity leave regulation. According to defendant Robert F. Kelly, the Division Superintendent of the Chesterfield County, Virginia, school system, the main reason for the maternity leave regulation is to foster "continuity of teaching" by giving the School Board advance notice upon which it can program its need for and secure replacement teachers in an orderly fashion.

He also indicated that the maternity leave regulation is based upon a concern for absenteeism of pregnant school teachers, for the safety of the school children in emergency situations, such as fire, and for the safety of the unborn fetus and the expectant mother as a result of the exposure to pushing by students in the school halls and classrooms. Similar expressions, although varying in emphasis, were

made by the chairman and members of the defendant School Board.

The expert medical evidence was that pregnancy alone does not incapacitate a school teacher after the fifth month of her pregnancy, and that no incapacitating medical disorders are certain to occur after the fifth month of pregnancy. It was conceded, however, that no two pregnancies are alike, and that certain incapacitating medical disorders peculiar to pregnancy could occur after the fifth month of pregnancy. The United States Court of Appeals for the Fourth Circuit, sitting *en banc*, recognized the School Board's reasons for the regulation and upheld it ". . . as contributing to the better education of the pupils by enabling school officials to arrange a larger degree of continuity in their education." (Pet. App. 22a)

REASONS FOR DENYING THE WRIT

1. The Decision Below Is In Harmony With Recent Decisions Of This Court.

In *Reed* v. *Reed*, 404 U.S. 71 (1971), this Court struck down an Idaho statute which gave preference to men in Probate Court appointments. This Court held the statute was purely arbitrary and unreasonable. However, this Court adopted the standard of reasonableness as that by which statutory sex classification should be judged for Fourteenth Amendment purposes. This Court said:

> "A Classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " 404 U.S. 71, 76.

In applying that test in this case the Fourth Circuit found simply that the regulation is reasonable and that it serves a

reasonable objective. It allows the school officials to plan for and make specific commitments to replacement teachers, and to avoid disruptions which would occur without such a rule. The decision below involves the application of the reasonableness test to a particular regulation, and the conclusion which the court derives from a particular factual context. It does not involve an important question of federal law which warrants consideration by the Supreme Court of the United States.

2. The Decision Below Does Not Involve An Important Question Of Federal Law Since The Equal Employment Opportunity Act Of 1972 Which Narrows The Holding In This Case Is Now Applicable To Public School Employment.

After the institution of this suit the Equal Employment Opportunity Act of 1972, P.L. 92-261, as amended, was made applicable to public school employment. §§ 701 and 702 of P.L. 92-261. The Equal Employment Opportunity Commission has issued new rules containing "guidelines" on mandatory maternity leaves. 37 Fed. Reg. 6837. These guidelines make it a *prima facie* violation of Title VII for an employer to exclude employees "from employment . . . because of pregnancies . . ." 29 C.F.R. 1604.10(b). (Pet. App. 28a). Accordingly, any case involving maternity provisions applicable to public school employees will now be decided under the Equal Employment Opportunity Act and not under the equal protection clause of the Fourteenth Amendment

A decision by the United States Supreme Court in this case would have little precedential value. Should this Court reverse the decision of the Fourth Circuit Court of Appeals, only the rights of petitioner under the equal protection clause of the Fourteenth Amendment would be determined.

The rights of other teachers under the maternity leave policy would be decided under Title VII of the Civil Rights Act. Therefore, this case no longer presents an important federal question.

This argument of insubstantial federal question applies with equal force to the apparent conflict in circuits created by this decision and *Schattman* v. *Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972) cert. denied, 41 U.S.L.W. 3372 (Jan. 8, 1973), both sustaining maternity leave provisions, and *La Fleur* v. *Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972), pet. for cert. filed Nov. 26, 1972, and *Green* v. *Waterford Board of Education*, unreported (2nd Cir., decided January 23, 1973), both holding maternity provision violative of the equal protection clause of the Fourteenth Amendment. It should also be pointed out that this conflict in circuits is more apparent than real, since each case involves an analysis of a maternity leave regulation which is different in scope and application. The regulation in *Cohen* is far more justifiable in that it alone permits a flexible application—it allows the school board to extend the duration of employment of a pregnant teacher when to do so will contribute to the continuity of education in the classroom. On the other hand, the regulations in *Schattman*, *Green* and *La Fleur* allow no such extension. (The regulation in *Schattman* provides "No employee anticipating maternity confinement may remain in active service with the commission later than two months before the expected delivery date." The regulation in *Green* requires a pregnant teacher to take a leave of absence "not less than four months prior to expected confinement or at such earlier time as a replacement becomes available." The regulation in *La Fleur* requires a pregnant teacher to take a leave of absence "not less than five (5) months before the expected date of the normal birth of the child. Application of

such leave shall be forwarded to the Superintendent at least two (2) weeks before the effective date of the leave of absence.") In addition, the variation in application and scope of these regulations affects a determination of their justification under the reasonableness test.

In the petition for certiorari filed in this case, petitioner has attempted to reargue the merits of the case and has asserted the merits argument as a basis for granting certiorari. Petitioner has failed to point to any substantial reason justifying a review on certiorari as set forth in Rule 19 of the Rules of the United States Supreme Court.

3. The Decision Below To Grant A Rehearing Does Not Violate Petitioner's Right To Due Process.

The petitioner has created a new issue in its petition for certiorari by alleging that the United States Court of Appeals for the Fourth Circuit violated petitioner's constitutionally guaranteed right to due process by granting a rehearing *en banc* without allowing counsel for petitioner the opportunity to file a brief and make oral argument in opposition. Rule 40 of the Federal Rules of Appellate Procedure provides:

> No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

The rule clearly provides for the procedure utilized by the Court in this case, and an attempt by petitioner to denomi-

nate the Court's exercise of discretion as a violation of petitioner's constitutionally guaranteed right to due process is wholly without merit. Moreover, this groundless criticism of the Court should be given no consideration when reviewing this petition for certiorari.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be denied.

Respectfully submitted,

FREDERICK T. GRAY
ROBERT E. EICHER
SAMUEL W. HIXON, III
Williams, Mullen & Christian
510 United Virginia Bank Building
Richmond, Virginia 23219

OLIVER D. RUDY
MORRIS E. MASON
P. O. Box 25
Chesterfield, Virginia 23832